(2)

NO. 90-965

Supreme Court of the United States

OCTOBER TERM, 1990

ALVY T. McQUEEN, *PETITIONER*

V.

COMPTROLLER OF PUBLIC ACCOUNTS, *RESPONDENT*

ALVY T. McQUEEN, *PETITIONER*

V.

UNITED STATES OF AMERICA, AND
COMPTROLLER OF PUBLIC ACCOUNTS,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS

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QUESTIONS PRESENTED

1. Whether Petitioner made a *prima facie* showing of improper disclosure of grand jury material necessary to warrant an evidentiary hearing, and, if so, whether the disclosure constitutes "matters occurring before the grand jury" within the meaning of Rule 6(e), Federal Rules of Criminal Procedure.

2. Whether the Tax Injunction Act, 28 U.S.C. §1341, bars federal court jurisdiction over a suit to enjoin the Comptroller of Public Accounts of Texas from issuing a jeopardy assessment until Texas enacts legislation providing prompt post-deprivation court hearings without pre-payment requirement, where Texas courts have not been afforded the opportunity to rule on Petitioner's constitutional claims, there being no authority that such state courts would refuse to hear Petitioner's claims, and in fact, there being authority to the contrary.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties.

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The Respondent, Comptroller of Public Accounts of Texas, respectfully requests the Court to deny the Petition for Writ of Certiorari seeking review of the decision of the Fifth Circuit Court of Appeals reported at 907 F.2d 1544.

STATEMENT OF FACTS

On June 2, 1988, tax auditors for the Comptroller of Public Accounts ("Comptroller") met with Petitioner to begin a motor fuels tax audit of his fuel distribution enterprise.[1] The first of the two jeopardy tax assessments at issue was for diesel fuel taxes for the one-month liability period of February, 1988. This assessment, dated June 23, 1988, was in the amount of $73,953.00 (Vol. 3, P. 492) and was based upon records obtained from third parties.[2] In September of 1988, these auditors learned that the Internal Revenue Service ("IRS") had obtained possession of certain of Petitioner's business records. Auditor McKinzie was allowed to review and copy certain business records at the IRS office in Houston, Texas. The documents he reviewed were represented to be ones seized pursuant to a search warrant issued in connection with an IRS investigation of Petitioner's fuel distribution enterprise. McKinzie was told that the records were separate and apart from certain grand jury documents that were strictly off limits. Based upon an audit of these records, the Comptroller increased the first assessment to $257,757.00 on January 16, 1989 (Vol. 2, P. 295), and on February 1, 1989, issued

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[1] See, Testimony of Michael C. McKinzie, one of the auditors involved, at Vol. 3, P. 60, l. 14-23. At press time, the Court had not requested the record. Respondent's record cites are to the record in Number 89-6146, the latter of the two cases coordinated for appeal by the Fifth Circuit.

[2] The record contains an affidavit from Petitioner's counsel, together with several exhibits which is loose in the file (noted at Vol. 2, P. 370). Attached to this affidavit (hereinafter "Townsend Affidavit") at Exhibit 19 is an informal transcript of portions of an administrative hearing pertaining to the two assessments at issue. At P. 7 of this informal transcript is testimony of the second auditor stating that the original assessment was based upon third-party records, and at P. 30 he identifies the sources of this information as Joe G. Tarrant and Allied Transportation Companies.

a second jeopardy assessment in the amount of $7,805,212.59 for the 35-month period of January, 1985 through January of 1988. This second jeopardy assessment was accompanied by a physical seizure of the assets of Petitioner's business.

Comptroller investigators were previously informed that Petitioner's business records were being secreted and removed out of Texas. (See, Testimony of Thomas John Huebner, counsel to the Enforcement Division of the Comptroller, at Vol. 4, P. 89). The records McKinzie reviewed were those obtained by the IRS pursuant to a federal search warrant served on June 18, 1988 in Grand Junction, Colorado.[3]

Petitioner at first filed a request for an administrative redetermination hearing for the February 1988 tax assessment prior to it being increased. By doing so, he chose not to seek a judicial determination of his claims provided by TEX.TAX CODE ANN. 112.051, et seq. (Vernon 1982), providing for the recovery of tax payments made under protest. According to the Comptroller's auditor, Petitioner's records obtained from the IRS established that Petitioner sold up to 3,000,000 gallons of diesel fuel[4] per month in the months immediately prior to the first assessment. Petitioner also filed a request for an administrative redetermination hearing of the 36-month audit jeopardy assessment that prompted the seizure of his business assets.

On February 14, 1989, Petitioner filed a Complaint and Request for Temporary Restraining Order and Pre-

[3] See, Townsend Affidavit, Exhibit 1, being a copy of the search warrant

[4] See, Testimony of Michael C. McKinzie, Vol. IV, pg. 81. This volume of sales would yield Petitioner $450,000 in fuel tax collections each month. Petitioner distributed an average of 1.13 million gallons monthly during the audit period.

liminary Injunction in the U.S. District Court for the Western District of Texas, Austin Division, seeking: (1) a return of his assets; (2) injunctions against the Comptroller from "violating Plaintiff's constitutional rights" and from making jeopardy assessments until legislation is enacted to provide "prompt post-deprivation court hearings"; for money damages and attorney's fees. (See, Petition, Appendix 7, P. 35a). This request for a temporary restraining order was denied February 17, 1989, without oral argument. On February 23, 1989, his Request for a Preliminary Injunction came on for hearing, and was continued until February 28, 1989, to allow him sufficient time to procure additional desired witnesses. On this second occasion the court received testimony from Michael C. McKinzie, the auditor performing the 36-month audit, and from three state attorneys regarding the events leading up to the assessments and seizure. Petitioner did not testify, nor offer any evidence in support of his request for a preliminary injunction. Petitioner, through his attorney, asserted a Fifth Amendment privilege and sought to prove his contentions via a "proffer", consisting of an undocumented statement, which Petitioner's attorney read into the record. (Vol. 4, P. 20 - 21). Petitioner's counsel stated that Petitioner's net worth "does not exceed $500,000." Petitioner presented no evidence that he was unable to prepay the one month assessment (then totalling $257,757) in order to obtain a judicial hearing of his complaints in state court. On March 10, 1989, the District Court granted the Comptroller's motion to dismiss. The court noted that Petitioner had available several state court remedies which were "plain, speedy, and efficient" within the meaning of 28 U.S.C. §1341 as to bar assertion of subject matter jurisdiction over the dispute. The court specifically found that Petitioner could receive back items seized after posting a bond in the amount of $135,000, which the court found "not an amount so large as to effectively prevent the Plaintiff from pursuing his remedies." (See, Petitioner's Appendix 5, P. 25a). Petitioner pursued an appeal to the U.S. Court of Appeals for the Fifth Circuit, No. 89-1257 (*"McQueen I"*),

which was argued October 4, 1989.

Meanwhile, after giving notice of appeal in *McQueen I*, Petitioner on June 20, 1989, filed suit in the U.S. District Court for the Southern District of Texas, Houston Division, against the United States of America and the Comptroller of Public Accounts, based on alleged violations of FED.R.CRIM.P. 6(e). That same day the court denied Petitioner's request for a temporary restraining order. On October 24, 1989, the court granted the United States of America's motion to dismiss, finding that Rule 6(e) is not implicated by the agents' conduct. (See, Petitioner's Appendix 6, P. 26a). Petitioner gave notice of appeal on October 26, 1989, (*"McQueen II"*). This appeal was coordinated by the Fifth Circuit with *McQueen I*, and argued June 6, 1990. On August 9, 1990, the Fifth Circuit affirmed the District Courts in both *McQueen I* and *McQueen II*, which is reported at 907 F.2d. 1544.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE RECORD DOES NOT RAISE THE ISSUES PRESENTED.

A. *McQUEEN II.*

The record below does not show that "matters occurring before the grand jury" were improperly disclosed, nor does it show that the documents obtained from federal employees - Petitioner's business records - were subject to the rule of secrecy. Given these facts, it is very unlikely that the Court would reach the issue presented in Question No. 1.

FED.R.CRIM.P. 6(e), is intended only to protect disclosure of what is said or what takes place in the grand jury room. *United States v. Interstate Dress Carriers, Inc.*,

280 F.2d 52, 54 (2nd Cir. 1960). The District Court correctly noted that Rule 6(e) is not implicated unless documents that are actually presented to the grand jury are disclosed.[5] When documents or other material will not reveal what actually transpired before the grand jury, their disclosure is not violative of the rule of secrecy. *Anaya v. United States*, 815 F.2d 1373, 1378-79 (10th Cir. 1987). The record clearly shows that IRS personnel went to great lengths to keep grand jury documents separate and apart from the business records disclosed to the auditor. (See, testimony of Michael C. McKinzie at Vol. 4, P. 67, 68).

Another compelling reason for denying the petition is that the documents reviewed by the auditor are not otherwise subject to the rule of secrecy embodied in Rule 6(e). The record is clear and Petitioner admits that the documents obtained were business records pertaining to Petitioner's purchases and sales of diesel fuel and gasoline.[6] The documents obtained by the Comptroller auditor were created for an independent business purpose, not directly related to the prospect of a grand jury investigation. Even if a grand jury had subpoenaed these documents, that fact would not insulate them from investigation in another forum. *See, SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1383 (D.C. Cir. 1980), cert. denied, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289, (1980). The District Court, correctly noting that the documents in question were never presented to the grand jury, properly dismissed Petitioner's complaint. The Fifth Circuit properly affirmed since Petitioner wholly failed to make a prima facie case of improper grand jury disclosure. *In re: Grand Jury Investigation (Lance)*, 610 F.2d 202, 216-17 (5th Cir. 1980).

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[5] See, Appendix I, the District Court's first order denying Plaintiff injunctive relief. After a motion for clarification, the court rendered the order contained in Petitioner's Appendix IV.

[6] Townsend Affidavit, Exhibit 1, being the search warrant with attached description of property to be seized.

Disclosure of information obtained from a source independent of the grand jury, such as a prior government investigation, does not violate Rule 6(e). Id. at 217.

Another reason why the Court is unlikely to reach Petitioner's Question No. 1 lies in the fact that the Comptroller auditors acted in good faith, having been told that the documents in question were not grand jury documents. Consequently, suppression would promote neither judicial integrity nor deter future misconduct. *LTV Education Systems, Inc. v. Bell*, 862 F.2d 1168 (5th Cir. 1989). In that case, the appellant argued that this court's decision in *United States v. Sells Engineering, Inc.*[7] should be applied retroactively, making improper a Rule 6(e) disclosure order relied upon in good faith by the civil division of the Department of Justice. The Fifth Circuit, noting that the facially valid Rule 6(e) order was relied on in good faith, found that suppression would not promote judicial integrity nor deter future misconduct by law enforcement officials, citing *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

B. McQUEEN I

Petitioner's claim that the Texas taxpayer remedies scheme denies him due process of law depends upon his assertion of inability to pre-pay the assessment in order to obtain a judicial hearing. (See, Petition, P. 6 and 33a.). He sought to establish this in the trial court via a "proffer" read into the record by his counsel.

Petitioner's counsel stated in this "proffer" that McQueen's net worth did not exceed $500,000. This does not establish McQueen's inability to pre-pay either the original assessment for February, 1988 ($73,953) or the increased assessment for this period ($257,757). It also

[7] 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983).

failed to establish that he could not afford a $135,000 bond to get back his seized property.

2. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, NOR IS THERE ANY IRRECONCILABLE CONFLICT OF AUTHORITY IN DIFFERENT CIRCUITS

A. McQUEEN II

Petitioner claims that the Court of Appeals decision contravenes this Court's holding in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), by holding that a district court is powerless to remedy illegal (as opposed to legal, albeit erroneous) access to grand jury materials.[8] The Court of Appeals specifically held that Rule 6(e) must be enforced through contempt motions filed against the individuals subject to the Rule. *McQueen v. Bullock*, 907 F.2d 1544, 1520 (5th Cir. 1990), at n.20. This holding does not, as Petitioner suggests, contravene this Court's holding in *Sells Engineering*.

Petitioner overstates footnote 6 of the Court's opinion in *Sells Engineering* as an endorsement of the Ninth Circuit's pronouncement that "the district court shall take such steps as are, in its discretion, necessary to protect the Appellant's from the effects of past disclosure." *In re Grand Jury Investigation No. 78 - 184 (Sells, Inc., et al.)* 642 F.2d 1184, 1192 (9th Cir. 1981). This Court adopted a much more restrained pronouncement of the Ninth Circuit in the footnote cited by Petitioner:

> We cannot restore the secrecy that is already been lost but we can grant partial relief by preventing further disclosure. *In re Grand Jury Investigation 78 - 184 (Sells, Inc.)*, 642 F.2d at 1187 - 1188.

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[8] See Petition, P. 11

The Court declined to hold that a grand jury subject or target may obtain general injunctive relief other than against the individual subject to the admonitions of Rule 6(e). The court on this occasion should similarly decline to address this issue because no irreconcilable conflicts exists among the circuits.

In *Matter of Special March 1981 Grand Jury*, 753 F.2d. 575 (7th Cir. 1985), the Seventh Circuit adopted the position of the Ninth Circuit *In re: Grand Jury Investigation No. 78 - 184 (Sells, Inc.)*, but only in order to decide the issue of standing. *Matter of Special March 1981 Grand Jury*, 753 F.2d at 577. The court, noting that the grand jury material constituted business records not constituting "matters occurring before the grand jury", found that the U. S. Attorney was free to turn over the records to state authorities. The court noted that by not making copies of the business records prior to turning them over to the grand jury in response to its subpoena, the Appellants attempted to put the records into "perpetual cold storage."[9] 753 F.2d at 578. The Court further noted that the Appellant had alternative remedies against the state's unauthorized use of the records, which Petitioner also enjoys. Petitioner has the opportunity to suppress illegally obtained evidence in the criminal proceedings in state court, and has sought this relief. In this regard, granting certiorari does not change the result of this case. He already has remedies for his complaints.

B. *McQUEEN I.*

Petitioner claims that his state court remedies are uncertain because he may not obtain general injunctive

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[9] Petitioner attempted the same ploy. The Assistant U.S. Attorney offered to allow Petitioner's counsel access to the business records to copy them, but was informed by letter that Petitioner had withdrawn his counsel's authority to receive those documents. See, Townsend Affidavit, Exhibit 23.

relief without posting bond in a prohibitive amount. (See, Petition, P. 22 - 24). Petitioner complains for the first time that TEX.TAX CODE ANN. 112.108[10] prohibits injunctive relief against the Comptroller other than via the pre-payment or double bond provisions of the Texas Tax Code. Although Petitioner is barred from challenging the decision of the Court of Appeals on the basis of this provision due to his failure to raise it below,[11] the decision of the District Court and Court of Appeals in *McQueen I* would be no less clearly correct.

The District Court made the proper inquiry into the "plain, speedy, and efficient" nature of the Texas remedies. (See, Petition, Appendix 5, P. 23a - 25a). To be adequate, the Texas remedies need not be equivalent to the remedies available in federal court[12], but only need to provide a forum for the litigation of the asserted federal rights. *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976). Prepayment requirements do not destroy the plain, speedy and efficient character of the state remedies. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 512 (1981).

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[10] Added by Acts 1989, 71st Leg., Chap. 232, § 16, effective September 1, 1989.

[11] *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 19, 24, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19 (1986), citing *FTC v. Grolier, Inc.*, 462 U.S. 19, 23, n.6, 103 S.Ct. 2209, 2212, n.6, 76 L.Ed.2d 387 (1983); and *Rogers v. Lodge*, 458 U.S. 613, 628, n.10, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012 (1982).

[12] Petitioner claims that the Tax Injunction Act does not bar federal jurisdiction here because Texas has failed to enact specific legislation providing for a prompt post-seizure hearing. See, Petition, P. 29. By contrast, he reasons, Congress "sought help from the best minds in the country" to draft § 7429, Internal Revenue Code of 1986. Petitioner's inescapable conclusion is that Texas' failure to do so constitutes fatal indifference. As Respondent will show, a review of Texas jurisprudence shows that the due process rights of aggrieved taxpayers are alive and well on the frontier.

The Fifth Circuit confirmed its earlier decisions upholding the jurisdictional bar of the Tax Injunction Act because of the "vast arsenal" of remedies available to Texas taxpayers to assure orderly judication of serious federal constitutional questions. *McQueen v. Bullock*, 907 F.2d at 548, citing *Dawson v. Childs*, 665 F.2d 705, 710 (5th Cir. Unit A, 1982) and *City of Houston v. Standard Triumph Motor Co.*, 347 F.2d 194, 199 (5th Cir. 1965), *cert. denied*, 382 U.S. 974, 86 S.Ct. 539, 15 L.Ed.2d 466 (1966). At the outset, the court below pointed out that the authority of a Texas trial court to issue an injunction to protect McQueen from irreparable injury is provided by the Texas Constitution. *McQueen*, 907 F.2d at 1548, n.12; TEX.CONST. art. V, §8. Even if Petitioner had properly raised the applicability of §112.108 (referred to by Petitioner as the "Texas Anti-Injunction Statute"), his argument is undercut by the fact that a Texas trial court's authority to issue injunctive relief is constitutional and does not depend on the whim of the Texas Legislature. A similar situation confronted this Court in *Tully v. Griffin*.[13] This Court, providing guidance for the court below, found that the general injunction statute would provide a basis for preliminary injunctive relief based upon state cases providing such relief when constitutional grounds are urged.[14]

[13] See, 429 U.S. 68, 73 at n.6. The New York tax laws similarly provided that no injunctive or declaratory relief was available outside the remedial scheme provided by New York law.

[14] In making this point during oral argument, Respondent's counsel pointed out footnote 7 of the *Tully* decision recognizing that the New York Attorney General, while acknowledging a New York Court's power to issue a preliminary injunction, remained free to oppose the granting of such relief in any particular case. Petitioner misconstrues these comments at P. 26 of his petition to state that if the remedy was reasonably certain then Respondent's counsel could not have responsibly reserved the right to argue in State court that the remedy is not available. Petitioner misapprehends the statement in footnote 7 of *Tully*. Although acknowledging a Texas court's *power* to issue a preliminary injunction under appropriate circumstances, the Attorney General of Texas remains free to oppose the granting of such

(Footnote continued on next page)

Petitioner bypassed Texas courts and has attempted to argue that the Texas courts would not hear his claims. In doing so, he has asked the Court to hold the Tax Injunction Act inapplicable on the mere speculation that the Texas courts would not allow him injunctive relief for his federal constitutional claims. (See, Petition, P. 24). This Court, in the recent case of *Franchise Tax Board of California v. Alcan Alumnium*, 110 S.Ct. 661 (1990), held that the taxpayer must demonstrate that his remedy is uncertain. 110 S.Ct. at 667. Where no state court decision refusing to hear the taxpayer's claim exists, the court must sustain the jurisdictional bar of the Tax Injunction Act rather than hold it inapplicable on mere speculation that the state court would not allow the taxpayer to raise his constitutional arguments. *Ibid.*

Petitioner struggles to find such contrary state authority in the lone case of *Dub Shaw Ford, Inc. v. Comptroller of Public Accounts*, 479 S.W.2d 403 (Tex.Civ.App. - Austin 1972, no writ). (See, Petition, pg. 25, 26). *Dub Shaw Ford, Inc.* held that a taxpayer who elects to proceed with an administrative redetermination is required first to exhaust such administrative remedy before suing for a declaratory judgment. The court raised the issue of whether a declaratory judgment remedy is still available given the creation of the administrative tax tribunal and statutory administrative remedies.[15] However,

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(Footnnote continued from previous page)
relief to Petitioner. Such relief would be inappropriate *in this particular case* because Petitioner failed to demonstrate inability to pay or post bond. Accordingly, there is no factual support for his constitutional arguments, and the Texas Attorney General would so argue before a Texas trial court.

[15]Petitioner may have overlooked *Dub Shaw Ford, Inc.* and painted himself into a corner by requesting a redetermination on the initial one month assessment in the amount of $73,953 rather than immediately suing for declaratory and injunctive relief in state court. The other possibility is that Petitioner has rested his entire case on this flimsy dicta from the outset.

the court specifically declined to rule on whether these alternative remedies outside the Texas Tax Code are available.[16] This passing comment is insufficient to disregard the intention of Congress "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes."[17] Petitioner's interpretation of this dicta conflicts with longstanding Texas precedent that such relief is available notwithstanding the taxpayer remedial scheme. For example, in *Cobb v. Harrington*, 190 S.W.2d 709 (Tex. 1945), the Texas Supreme Court held that the protest suspense statute does not prevent a taxpayer from bringing a declaratory judgment action to determine whether the Comptroller could legally demand the tax at issue. While upholding the validity of the suspense statute, the court held it was not made exclusive (as the *Dub Shaw Ford, Inc.*, dicta suggests) by the administrative remedies created by Texas tax statutes (now in the Texas Tax Code):

> The suspense statute is not of that kind. It applies *in general* to any occupation, gross receipt, franchise, license or privilege tax or fee required to be paid any state official and authorizes suit in any court of competent jurisdiction in Travis County. 190 S.W.2d at 714.

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[16] "However in the case at bar we need not decide whether the alternate remedies discussed above are available. The question before us has narrowed to a consideration of the doctrine of exhaustion of administrative remedies." 479 S.W.2d at 406.

[17] *McQueen v. Bullock*, 907 F.2d 1544, 1547 (5th Cir. 1990) at fn. 8, citing *Franchise Tax Board of California v. Alcan Alumnium*, 110 S.Ct. 661, 666, 107 L.Ed.2d 696, 705 (1990); *California v. Grace Brethren Church*, 457 U.S. at 409, 102 S.Ct. at 2508; and *Rosewell v. City of LaSalle National Bank*, 450 U.S. at 522, 101 S.Ct. at 1233 - 34.

This distinction squares with previous decisions of the Texas Supreme Court. In *Rogers v. Daniel Oil and Royalty Company*, 110 S.W.2d 891 (Tex. 1937), the court upheld the validity of the suspense statute as an exclusive remedy, but nonetheless affirmed the granting of temporary injunctive relief on principles of equity. The Texas Supreme Court held that the suspense statute was not "complete and adequate" insofar as it required the taxpayer to institute a multiplicity of protest suits because of his ongoing oil production activities. Accordingly, equity would intervene to grant injunctive relief to meet the needs of justice. 110 S.W.2d at 895, 896.

Additionally, Texas courts have fashioned remedies to protect vested property rights adversely affected by the action of an administrative body so as to invoke the protection of the due process clause of the Texas constitution. In *Brazosport Savings and Loan Association v. American Savings and Loan Association*, 342 S.W.2d 747 (Tex. 1961), the Texas Supreme Court held that when a vested property right has been adversely effected by the action of an administrative body so as to invoke the protection of due process, an inherent right of appeal has been recognized by Texas courts. This doctrine has been utilized in a multitude of situations to provide due process relief, oftentimes with additional injunctive relief to prevent irreparable injury. *See, e.g., Martine v. Board of Regents, State Senior Colleges of Texas*, 578 S.W.2d 465 (Tex.Civ.App. - Tyler 1979), relief granted and affirmed after remand, 607 S.W.2d 638 (Tex.Civ.App. - Austin 1980, writ ref'd n.r.e.).

Additionally, as this Court recently noted in *Pennzoil v. Texaco*, 107 S.Ct. 1519 (1987), the Texas Constitution contains an open courts provision[18] guaranteeing a right of action in Texas courts to protect due process rights. As in

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[18] TEX.CONST. art. I, § 13 provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

Pennzoil Co., Inc. v. Texaco, Inc., the Court must assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary, where Petitioner has not attempted to present his federal claims in state court. 107 S.Ct. at 1528. To do otherwise, as Petitioner urges, would be to improperly assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims. Ibid.

The case of *Texas Alcoholic Beverage Commission v. Macha*, 780 S.W.2d 939 (Tex.App. - Amarillo 1989, writ denied), cited by the court below[19], is an example of the availability of due process relief to Texas taxpayers. In *Macha*, the court held that TEX.TAX CODE ANN. 112.101 (Vernon 1982) does not - as Petitioner contends - prevent a trial court from granting an injunction on equitable grounds. The taxpayer claimed that the suspension of his liquor permits for failure to remit taxes allegedly violated the Texas Constitution's due process clause. The trial court enjoined the commission from suspending the permits and the Court of Appeals affirmed. The Fifth Circuit analogizes McQueen's grievance to that of the taxpayer in *Macha*: both only requested due process without impugning the validity of the underlying assessment. The Court of Appeals correctly concluded that "Texas law does not even whisper that the general injunction statute would not apply." 907 F.2d. at 1550.

The wisdom of the court below and its knowledge of Texas procedural law pertinent to this case is shown by decisions of the Austin Court of Appeals[20] subsequent to the decision below. That court recently confirmed the availability of the *Cobb v. Harrington* - type declaratory judgment to challenge the validity of a tax in *Bullock v.*

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[19] 907 F.2d at 1549.

[20] See Petitioner's footnote 9 extolling the special expertise of this tribunal.

Marathon Oil Co., 798 S.W.2d 353, 359-361 (Tex.App. - Austin 1990, no writ). It affirmed a trial court ruling that the state is not immune from suit outside taxpayer remedial scheme in Chapter 112 of the Texas Tax Code, contrary to Petitioner's assertions.[21] Earlier, in *Hammerman & Gainer, Inc. v. Bullock*, 791 S.W.2d 330, 331 (Tex.App. - Austin 1990, no writ), it again cited *Cobb* for the proposition that the Texas Tax Code's waiver of immunity is not exclusive and that declaratory relief was available since the taxpayer did not seek a refund, but sought to challenge the validity of the tax. In footnote 1 of that opinion the court notes that its decision is not controlled by §112.108 (the "Texas Anti Injunction Act"), which took effect after the signing of the judgment. Even so, this provision by its terms only purports to bar injunctive and declaratory relief insofar as the constitutionality *of the tax*[22] and not the *process*[23] by which the tax is administered. It only seeks to impose a pre-payment requirement to challenge constitutionality of a tax. It does not, as Petitioner suggests, seek to bar challenge to the *process* by which taxes are administered absent pre-payment.

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[21] See Petition, P. 26, citing *Contran Corp. v. Bullock*, 567 S.W.2d 616 (Tex.Civ.App. - Austin 1978, no writ). *Contran* merely holds that a taxpayer may not maintain a suit for refund unless he complies with the statutory requirement of accompanying this protest payment with a specific statement of his contentions. TEX.TAX CODE ANN. §112.051.

[22] For example, the kind of complaint raised by the taxpayer in *Bullock v. Texas Monthly*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d. 1 (1989), challenging the sales tax on First Amendment grounds.

[23] For example, the kind of complaint raised by the taxpayer in *Commissioner of Internal Revenue v. Shapiro*, 424 U.S. 614 (1976). Petitioner, unable to find a specific legal rule in Texas jurisprudence exactly stated like the exception in *Enochs v. Williams Packing Co.*, 370 U.S. 1 (1962), overlooks a forest of remedies around him.

The judicial climate for Petitioner's due process rights is unchanged from the time of the pronouncement of the distinguished jurist, Judge John R. Brown, writing for the Fifth Circuit in *City of Houston v. Standard - Triumph Motor Co.*:

> The record is plain. The remedies available in the State Courts of Texas are plain, speedy and efficient, and altogether complete. Nothing the Federal Court can grant by way of declaratory judgment or otherwise afford to this Importer a single right which it may not assert with confidence in the Courts of Texas. 347 F.2d. at 200.

In making this pronouncement, Judge Brown (like Judge Goldberg below) noted that this confidence was undeniably justified by recent decisions of Texas courts.[24] In due course, Texas courts will rule upon the issues raised by Petitioner, including the alleged conflict between federal due process rights and the recently-enacted TEX.TAX CODE ANN. §112.108 ("the Texas Anti-Injunction Act"). But unless the courts of Texas should betray the confidence of the federal judiciary by rendering decisions not protecting the due process rights of aggrieved taxpayers, McQueen's petition, and others like it, should be denied.

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[24] *Id.* at 200, Fn. 15:

> Within the very recent past in determining cases in which Federal Three-Judge District Courts have entered abstention orders, Texas courts have held Texas statutes invalid under the federal constitution. (Citations omitted)

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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